International Association of Bridge, Structural and Oranamental Iron Workers, Local No. 433 (The Associated General Contractors of California, Inc.) *and* Waldo F. Kusterns. Case 21–CB–5081

May 24, 1991

DECISION AND ORDER REMANDING

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On October 31, 1989, the Regional Director for Region 21 of the National Labor Relations Board issued a backpay specification and notice of hearing in the above-entitled proceeding seeking to effect compliance with that portion of the Board's 1977 order directing the Respondent, inter alia, to make whole those individuals who suffered loss of earnings as a result of the Respondent's assigning 76 jobs to favored members.

Thereafter, on various dates between November 1989 and April 1990 a hearing was held before Administrative Law Judge George Christensen. In September 1990 counsel for the General Counsel and the Respondent submitted a joint motion to Judge Christensen seeking his approval of a settlement agreement. On November 6, 1990, after considering objections submitted by the Charging Party, Judge Christensen issued an Order granting the joint motion and approving the settlement.

On November 14, 1990, the Charging Party filed a request for special permission to appeal the judge's Order approving the settlement agreement. The Charging Party contends that the General Counsel neither sought nor obtained approval of the settlement from any of the discriminatees, that the settlement does not adequately remedy the Respondent's unfair labor practices or make the discriminatees whole, that the motion to approve the settlement was not supported by a showing that the Respondent's defenses might be sustained, that the factual record and the authority cited do not support the premises of the joint motion, and that the judge's conclusion that approving the settlement effectuates the purposes of the Act is not a legal basis for depriving the discriminatees of the backpay to which full adjudication would entitle them. The Charging Party moves the Board to reject the settlement agreement and remand this proceeding for a hearing.

On November 20 and December 4, 1990, respectively, the General Counsel and the Respondent[1] filed opposition to the Charging Party's request for special permission to appeal. The General Counsel asserts that ''precise identification of the 76 discriminatees is an impossible task given the contractual procedures in effect during the relevant period of time regarding the dispatch of individuals to jobs from its hiring hall,'' that it was not possible to formulate specific amounts of backpay for each discriminatee, and that there are a variety of potential defenses, including whether the discriminatees mitigated damages, whether discriminatees failed to seek work through the hiring hall, and whether certain discriminatees are barred by the doctrines of res judicata or collateral estoppel from seeking relief before the Board. The General Counsel further asserts that the Board has taken into consideration a number of factors in deciding whether to approve non-Board settlements, that the settlement agreement here meets the Board's criteria, that none of the employees who testified had actually been determined to be a discriminatee, and that in all the circumstances, the Board should deny the appeal and affirm the judge's approval of the proposed settlement.

Considering all the parties' arguments, we conclude that we should grant the Charging Party's request to appeal and remand the case to the judge for a fuller explanation of his reasons for recommending approval of the settlement.

We are sympathetic to the arguments made by the General Counsel and the Respondent concerning the difficulties of litigating the backpay issues in this case, and we agree with our dissenting colleague that termination of this lengthy litigation is a consummation devoutly to be wished. We do not agree, however, that approving the settlement on the present record would necessarily lead to that result. The Charging Party would be entitled to seek court review of our approval of the settlement and, if a reviewing court found our reasons for approving the settlement inadequate, the case would be back before us for yet another round of litigation. See *Oil Workers v. NLRB*, 806 F.2d 269 (D.C. Cir. 1986).

The Board has announced standards applicable to proposed non-Board settlements of unfair labor practice cases in which complaints have issued but violations have not yet been proven. *Independent Stave Co.*, 287 NLRB 740 (1987). Those same standards logically apply to settlements of backpay proceedings in which the backpay specification has issued, a judge has not yet resolved the issues raised by the specification and the respondent's defenses, and one of the parties to the proceeding objects to the settlement. The judge did not apply those standards, or any other precise standards, here. He simply recited the procedural history of the case, described the terms of the proposed settlement, stated that he had considered the arguments of counsel and the evidence in the proceeding, and was ''persuaded [that] the purposes of the Act'' would be ''served by [his] accepting and approving the settlement agreement.'' The Charging Party has, not unrea-

[1] The Respondent joined the General Counsel's opposition and also argued that ''there are a number of compelling defenses to the award of any backpay to virtually all of the alleged discriminatees.''

sonably, attacked this as a ''summary . . . disposition of [the discriminatees'] claims.''

Because the judge is the one who has heard the evidence, we believe he is in a better position than we, at least initially, to articulate a ground for accepting or rejecting the proposed settlement under the *Independent Stave* standards. This will not necessarily entail an extended factual and legal analysis of all the issues raised by the backpay specification and the Respondent's answer. More explanation than the judge has supplied, however, is needed before approval of the settlement can be justified.

ORDER

It is ordered that the Charging Party's request for special permission to appeal is granted.

IT IS FURTHER ORDERED that this proceeding is remanded to Administrative Law Judge George Christensen for the preparation of a decision and recommended Order under Section 102.45 of the Board's Rules and Regulations in accordance with our opinion above.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and recommendations, and that following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

MEMBER DEVANEY, dissenting.

I would accept the settlement as recommended by the General Counsel and the administrative law judge and put this matter to rest. The chronology in this proceeding brings to mind Charles Dickens' *Bleak House* and the infamous case of Jarndyce v. Jarndyce. As Dickens put it:

> This scarecrow of a suit has . . . become so complicated that no one alive knows what it means. The parties to it understand it least . . . .
>
> Innumerable children have been born into the cause; Innumberable young people have married into it; Innumerable old people have died out of it.
>
> Scores of people have deliriously found themselves made parties . . . without knowing how or why . . . . But [it] still drags its dreary length to court, perennially hopeless.[1]

The underlying charge in this case was filed in 1974; the complaint issued in 1975. After 6 days of hearing, Administrative Law Judge Richard Taplitz issued a decision and recommended Order in 1976. In 1977, the Board affirmed the judge's decision and adopted his recommended Order. The Board's Decision and Order was affirmed by the Ninth Circuit in 1979 (600 F.2d 770), and certiorari was denied by the U.S. Supreme Court (445 U.S. 915) in 1980.

Nine years later, after a prolonged investigation and the issuance of an original and amended backpay specification in 1989, this matter came before Administrative Law Judge George Christensen who conducted a hearing on the issues raised by the parties on various dates between November 1989 and April 1990. In September 1990 counsel for the General Counsel and counsel for Respondent Union submitted a joint motion to Judge Christensen seeking his approval of a settlement agreement. And now, 17 years after the charge was filed, and 14 years after the Board's initial Decision and Order, my colleagues remand this case for further hearing—an action which, it seems to me, is likely to result only in further litigation before the Board and the circuit courts.

Like Jarndyce v. Jarndyce, this case has become a sad commentary which underscroes the futility which follows when, as here, litigation becomes an end in itself. I am fully aware that the settlement accepted by the judge provides for less than 20 percent of the figure set forth in the General Counsel's original compliance specification. However, given the uncontroverted difficulty, if not the impossibility, of identifying individual discriminatees and the uncertainties of further litigation which the General Counsel faced, I believe returning this matter to the administrative law judge at this point serves no purpose. My colleagues suggest that the case will somehow be expedited by remanding to the judge for ''a fuller explanation of his reasons for recommending approval of the settlement.'' As my colleagues note, the judge fully reviewed the facts and arguments advanced by the parties and the evidence adduced at hearing. On the basis of that review, the judge held that the purposes of the Act would be served by accepting the settlement. I do not believe that, on remand, the judge will be in any better position to expand on his rationale for acceptance of the settlement. Both the General Counsel and the judge recognize that the settlement amount today is less than it would have been had the matter been settled when the charge was filed 17 years ago. Two old and tested maxims from the world of poker come to mind: (1) ''in for a penny, in for a pound''; and (2) ''don't throw good money after bad.'' We have thrown in more than our share of good money. It is time to call a halt and accept the recommendation of the General Counsel, the Respondent, and the judge to accept the settlement and end this litigation.

[1] Charles Dickens, *Bleak House.*